SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940.

No. .....

CLARA E. HARE, ET AL., PETITIONERS,

VS.

ALLEN W. HENDERSON, ET AL., RESPONDENTS.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINION OF THE COURT BELOW.

The opinion in the Circuit Court of Appeals has not been reported, but a certified copy of the same is attached to and made a part of the record (R. ...).

II.

JURISDICTION.

(1) The date of the judgment to review, is July 9, 1940 (R. ...).

(2) The grounds and reasons which are relied upon as the basis of this court's jurisdiction, are fully set out in four separate grounds in this petition, at pages 8-12, under the heading of "Reasons Relied Upon For The

Granting of The Writ;" which said four grounds are here referred to for consideration as fully as if re-copied herein.

(3) The above grounds of jurisdiction referred to, fully set out a denial of the due process clause of the Fourteenth Amendment to the Constitution of the United States, and that the opinion of the Circuit Court of Appeals is in conflict in its construction of the local statutory law of Texas, with the uniform decisions of the Supreme Court of Texas.

(4) The due process clause of the first section of the Fourteenth Amendment to the Constitution of the United States, together with the cases believed to sustain the jurisdiction, are set out in said above four grounds.

III.

STATEMENT OF THE CASE.

A full statement of the case has been given in the petition, under the heading "Summary Statement of the Matters Involved," found on pages 1-8 of the petition, to which reference is made.

IV.

SPECIFICATIONS OF ERROR.

We adopt each of our four grounds of jurisdiction as four separate assignments of error, and refer to same on pages 8-12 of this petition without re-copying here.

We also refer to, without re-copying here, our first and second assignments of error, on pages 12-13 of this petition, to be considered in the event the writ is granted.

V.

ARGUMENT.

First Point.

In the case of *Postal Telegraph-Cable Co.* v. *City of Newport*, 247 U. S. Reports, page 464, 62 L. Ed., p. 1215, the Supreme Court of the United States took jurisdiction to review a state court judgment, as shown by head note No. 4, as follows:

> "The decision of a state court that a judgment against a corporation, rendered in a suit begun two years after it had conveyed all its property in the state to another corporation through which a third corporation afterwards acquired title, concluded the latter corporation as being in privity of estate with the first-named corporation, is too clearly ill-founded to sustain its judgment against reversal in the Federal Supreme Court."

The 2nd head-note of the decision is as follows:

> "The theory of privity of estate may not be invoked to make a judgment against a prior owner conclusive against his successor in interest, where the suit in which the judgment was rendered was not brought until after the grantor had parted with the title."

And in the course of the opinion on the point, it is said:

> "The doctrine of *res judicata* rests at bottom upon the ground that the party to be affected, or some other with whom he is in privity, has litigated or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction (citing authorities). The opportunity to be

heard is an essential requisite of due process of law in judicial proceedings (citing authorities). And as a state may not, consistently with the Fourteenth Amendment, enforce a judgment against a party named in the proceedings without a hearing, or opportunity to be heard (citing authorities), so it cannot without disregarding the requirements of due process give a conclusive effect to a prior judgment against one who is neither a party, nor in privity with a party therein" (p. 1221).

In this case Mills had conveyed the title to the land to Mrs. Brown, now Hare, in ~~1892~~ 1902, twelve years before the institution of the suit in Orange County by the Hendersons against Mills to recover the title to the land. And since Mrs. Brown, now Hare, was not a party to this suit, the judgment therein could not affect her directly or indirectly, as erroneously decided by the Circuit Court of Appeals, to give her notice of an intention on the part of the Hendersons to rescind the deed which their parents had made in 1902 to Frank Mills.

Mr. Justice Holmes, in the case of *Chicago Life Insurance Company* v. *Cherry*, 61 Law Ed. U. S. 969, said:

> "A court that renders judgment against a defendant thereby tacitly asserts, if it does not do so expressly, that it has jurisdiction over that defendant. But it must be taken to be established that a court cannot conclude all persons interested by its mere assertion of its own power (*Thompson* v. *Whitman*, 18 Wall. 457, 21 L. Ed. 897), even where its power depends upon a fact and it finds the fact (*Tilt* v. *Kelsey*, 207 U. S. 43, 51, 52 L. Ed. 95, 99, 28 Sup. Ct. Rept. 1)."

The case of *Coe* v. *Armour Fertilizer Works*, 59 L. Ed. U. S. 1027, is relevant to this question. In that case

the Armour Fertilizer Works recovered a judgment in the Circuit Court of Florida against the Parrish Vegetable & Fruit Company, a corporation, and execution having been returned unsatisfied against the defendant, levy was made upon the property of Coe as a stockholder in the defendant corporation to recover under his stock certificate "an amount equal to the amount remaining unpaid upon the subscription stock of the said Henry L. Coe to the stock of said corporation."

Under a statute of Florida at the time a stockholder in a corporation was liable for the debts of the corporation to the extent of "an amount equal to the amount remaining unpaid upon the subscription—to the stock of said corporation." And the statute in force at the time of the levy made no provision for notice to the defendant Coe.

Coe sued out an injunction against the levy and sale which the lower court determined against him. And on appeal to the Supreme Court he contended that the statute was unconstitutional in fixing the amount of his liability as his unpaid subscription to pay the debts of the corporation without due notice and an opportunity to be heard. But the Supreme Court overruled the contention and affirmed the judgment of the lower court. And this was the question presented to the Supreme Court of the United States.

And the court, in deciding that the statute of Florida undertaking to visit constructive notice upon the stockholder in the corporation to determine his indebtedness upon his stock subscription, held that it was in violation of due process of law as provided in the Fourteenth Amendment to the Constitution of the United States.

The case of *McDonald* v. *Mabee*, 243 U. S. Rep. 89.., 61 L. Ed. 608, settles the question that on collateral attack of a state court judgment, the federal right of question as to whether the defendant in the state court suit was properly brought before the court, is open to inquiry in the Federal courts.

In that case, the first judgment taken in the case of McDonald vs. Mabee was offered by Mabee in the second suit by McDonald against him as an estoppel. The Supreme Court of Texas decided that the first judgment was an estoppel. But the Supreme Court of the United States held that this first judgment presented the question of due process of law, requiring the Supreme Court to review the facts and determine if such notice was given Mabee as was required by the due process clause of the Fourteenth Amendment of the Constitution. And the Federal Supreme Court, upon re-examining the facts, decided that they were insufficient to give such notice, although the Supreme Court of Texas had decided that they were.

Second Point.

The purported judgment taken in the Orange County suit filed by the Hendersons against Frank Mills was a nullity, and without any binding effect even upon Mills, because the court was without jurisdiction over Mills to hear the case and render judgment. And certainly such void judgment could not affect Mills' prior vendee, Mrs. Brown, with any notice on the part of the Hendersons to rescind the deed made by the Hendersons to Frank Mills.

Vernon's Sayles' Texas Civil Statutes, Vol. 2, Chapter 23, provides:

"Article 2172. Actions maintainable against non-residents.

"An action may be brought and prosecuted to final decree, judgment or order, by any person claiming a right or interest in or to any property in this state, against any person or persons who are non-residents of this state, or whose place of residence is unknown, or who are transient persons, who claim an adverse estate, or interest in, or who claim any lien or encumbrance on said property, for the purpose of determining such estate, interest, lien, or encumbrance, and granting the title to said property, or settling the lien or encumbrance thereon" (Acts 1893, p. 77).

Article 2173, *Id.*, provides for service on such persons by publication.

Article 2174 specifies the prerequisites in the pleadings.

Article 2175 is:

"*Judgment by default cannot be rendered.* No judgment *by default shall be taken in such case by reason of the failure of the defendant to answer; but the facts entitling the plaintiff to judgment shall be exhibited to the court on the trial; and a statement of the facts shall be filed* as may be provided by law in suits against non-residents of this state where no appearance has been made by them."

The foregoing special jurisdictional statutes have received the following judicial construction in both the United States and Texas courts:

Galpin v. *Page*, 85 U. S. 350-375, 21 Law Ed. 964; *Murray* v. *Am. Surety Co.*, 17 C. C. A., page 138; *Mingus* v. *Wadley*, 285 S. W. 1088.

The case of *Sewell* v. *Spitzer,* 234 S. W. 1085, decided that a prior vendor, such as Mills, having previously sold the land, could not by such proceeding be a party under the law, or affect the rights of his vendee.

The Court said:

> "Dan Spitzer having parted with his own interest in the property, Articles 2172 to 2177, inclusive, of the Revised Statutes, have no application."

Third Point.

In the present case, from and after the year 1914, neither constructive nor actual notice would give the right to a holder of a vendor's claim, under any circumstances, to rescind such conveyance. Such right was conclusively barred by the Acts of 1913 and the uniform decisions of the Supreme Court, above referred to, giving a conclusive and final effect to such bar.

The Legislature of 1913, and the special session of 1913, as to *vendor's lien notes executed prior to July 14, 1905,* provided by Article 5695, as amended, as follows:

> "And providing those owning the superior title to land retained in any deed of conveyance or his transferee and those subsequently acquiring such superior title by transfer, shall have twelve months after this Act takes effect within which to bring suit for the land, if their claim to the land is not otherwise invalid, and unless suit is brought within twelve months after this Act takes effect, they shall be forever barred from bringing suit to recover the same."

Until the day that the above act of the Legislature took effect, the vendor holding the superior title to a conveyance made *before 1905* was without limitation as to

time for bringing a suit based upon said superior title to recover the land; and there was no time limit barring the vendor's right to rescind the sale and recover from the vendee the subordinate title by act of the parties out of court. But the limitation statute of 1913, above quoted, by its terms gave the vendor twelve months after the act took effect to bring suit for the land, and unless the suit was brought within twelve months, the vendor holding such superior title would be forever barred from bringing suit to recover the land.

The act, by its terms, not only limited the time in which the vendor might bring suit for the land, but by its terms *took away all other rights, including rescission from the vendor holding such superior title.*

In the case of *Calvin* v. *Olscheweke,* 62 S. W. (2d) 571, Judge Pleasants said:

> "Plaintiff's right to a rescission, in this suit, of the deed by Mrs. Lohff conveying the land to appellee, and her right to recover any unpaid balance upon appellee's note, are barred by the statute of limitations pleaded by appellee."

In the case of *Fleming* v. *Todd,* 42 S. W. (2d) 123, it was held (headnote 7 thereof, as follows):

> *"Purchasers acquiring absolute title when vendor's lien became barred by limitation could not be divested thereof and title re-invested in vendor by purchasers' oral consent to rescission by vendor."*

Chief Justice Walker, in deciding that the vendor having lost his superior title by limitation *was without right or power to declare a rescission,* said:

"The allegation of title by rescission was also subject to demurrer. Notwithstanding what we have said about construing the petition as to the notes recited in the deed, if it should be correctly construed as resting the rescission upon these notes, appellant can have no relief upon such allegation because these notes were barred by limitation in May, 1926, the date of the rescission. If the rescission rests upon a contract to execute notes to mature February 1, 1921, and February 1, 1922, with the notes recited in the deed, such notes and contract were also barred in May, 1926. Again, if the petition be construed as pleading a contract whereby appellant could compel Todd and Banks to execute notes for the excess acreage, his action upon the contract was within the four years' statute (Rev. St. 1925, Art. 5527) and, therefore, barred in May, 1926. The bar of the notes operated also as a bar of the claimed vendor's lien. The bar of the vendor's lien made the title in Todd and Banks absolute. It follows that, having lost his superior legal title by limitation, appellant was without right or power to declare a rescission in May, 1926.

"The allegation that Todd and Banks consented orally to the rescission was also subject to the demurrer. The absolute title being vested in them, it could not be divested out of them and reinvested in appellant by the alleged oral agreement. *Sanborn* v. *Murphy,* 86 Texas 437, 25 S. W. 610" (p. 126).

No claimed acts of rescission on the part of the Hendersons after the judgment taken in that suit, in 1915, can be "coupled" with it; and the court was in error in so deciding, because the proceeding and judgment constituted in law no notice of an intention to rescind the deed either to Mills or his vendee, Mrs. Hare.

The "acts of rescission" thereafter pleaded by the defendants, and enumerated by the trial court, must, therefore, be regarded as entirely disconnected from the suit and judgment in the Orange County District Court.

The first of these acts relied upon to evidence notice of rescission of the deed occurred many years after the judgment was taken in the Orange County District Court.

We have shown that these acts relied upon to give notice of the intention to rescind the deed on the part of the Hendersons to the defendant *would have been insufficient before the passage of the Act of 1913.* However, *after the passage of the Act of 1913, the right of rescission on the part of the vendor was abolished.* To contend otherwise is to affirm that the act in nowise affected the rights of the vendor holding the superior title preventing him, as under the old law, from rescinding the deed without limitation of time, either by suit in court or by the acts of the parties out of court.

And we submit that the Supreme Court of Texas has denied this contention in the opinion of Chief Justice Cureton in the case of *Cathey* v. *Weaver,* 242 S. W. 452, in the following language:

> "The obligation held by the plaintiff in error, Cathey, falls within one of the classes which have been named, and for his benefit the specific remedy of suit for the land within twelve months after the act became effective was enacted. Having specifically provided a remedy for him, or those similarly situated, the statute, as written in this instance, *is to be construed as denying to him any other remedy.* That is to say, if he was the owner and holder of the superior title, and a vendor's lien note thereby secured, but barred by limitation, *his only remedy un-*

der the statute was to file suit for the recovery of the land within one year after the amendment became effective. He held the superior title to the land in controversy at the time the Acts of 1913 became effective, and his note was at that time barred by limitation. Under paragraph 6 of the amended article he was allowed one year after November 18, 1913, to file suit for the land. This paragraph created for him an exception to the general inhibitory terms of Article 5694 as amended. He came clearly within the class to which paragraph (6) applies, but he exercised no rights under it. He did not bring an action to recover the land within the time permitted by law, and therefore cannot recover in this action" (pp. 452-453).

Fourth Point.

The case of *Bunn* v. *City of Laredo*, 245 S. W. 426, as well as the *Benn* case, *supra* (cited and basically relied on by the courts below), establishes beyond question that the statute of limitation of 1913 did not include or undertake to affect those executory contracts of the vendor which upon their face retained in the vendor the legal and equitable title until the purchase money was paid, for by the terms of the deed the vendor was given the right of forfeiture and re-entry without suit—purely *contracts to acquire title to land.*

In the Bunn case, the City of Laredo, by an ordinance, through and under which it made the contract, provided that:

> "The purchaser was required to give his promissory note for the balance of the purchase price payable to the City and secured by vendor's lien expressly retained therein; and *providing that in case of default in principal or interest the purchaser should forfeit all right to the land and the City*

Secretary should endorse on the note 'land forfeited' and make an entry to that effect on the account of sales kept by him, and thereupon the land should be forfeited to the City without the necessity of re-entry or judicial ascertainment.''

And Judge McLendon, speaking for the Commission of Appeals, in that case, *held that the statute of limitations of 1913 had no application to a contract of this character*; and the court in support of its conclusion cites the case of *Goldfrank* v. *Young,* 64 Tex. 432, and says:

> ''And that where the parties themselves have created their own remedy by contract whereby their rights may be enforced independently of the courts, such remedy is not affected by the limitation statute.''

And concludes the opinion as follows:

> ''We think, therefore, that the trial court and the Court of Civil Appeals held that the City's right to forfeit the land in the manner prescribed in the ordinance was not destroyed or affected by the 1913 Act, and that when the City resorted to such remedy and repossessed itself of the land, its title and possession were unassailable by those claiming under the unfulfilled contracts of sale.''

The case of *Benn* v. *Security Realty Company,* 54 S. W. (2d) 147, was where the deed retaining vendor's lien notes *expressly gave the right of forfeiture, re-entry and possession in the event of the non-payment of the notes,* and, of course, comes within the rule of *Bunn* v. *City of Laredo.*

As hereinbefore pointed out, it is obvious that the statute of limitation of 1913 and its amendments have

no application whatever to executory contracts to acquire title to land, *but related entirely to deeds that were absolute upon their face,* expressly retaining vendor's liens for the purchase money.

So expressly held by the Texas Supreme Court in reviewing these identical cases (see 242 S. W., p. 452, cited *supra*), with which the federal court in this case is in direct conflict.

Fifth Point.

On the alternative contention that in any event the court erred in not adjusting the equities by permitting Mrs. Brown, now Hare, to pay such amount as was due on the notes, after deducting the amount received by the Hendersons for oil leases, If this case were ruled under the law prevailing before the passage of the Limitation Act of 1913, the petitioners were entitled to recover the land on an adjustment of the amount due on the note, or, if respondents, in equity, were entitled to rescind, they should return such part of the purchase money as in equity the court should determine.

In *Evans* v. *Bentley,* 29 S. W. 497, the deed was made to the wife as her separate property, retaining a vendor's lien to secure the purchase money note which was signed by her husband. Afterwards the vendor brought suit against the husband to foreclose the vendor's lien note, but did not make the wife a party to the suit. Notice was had on the defendant by citation to a non-resident, which was personally served upon him, and judgment taken against the husband and the vendor's lien foreclosed in 1878, and the vendor, buying it in on foreclosure, after getting the sheriff's deed, paid the taxes and exercised all the usual acts of ownership on the

property, and in 1884 sold the lots at an enhanced price, during all of which time there was no claim by the Bentleys, until this suit was filed in 1891. That was the situation when this suit was brought by the wife, joined by her husband, to recover the lots as the separate property of Mrs. Bentley, and, in the alternative, to recover the value of the property which had been sold by the vendor. *The question in the case was whether the suit and judgment against Mr. Bentley was a rescission as to Mrs. Bentley, not a party to it.* The court held, in legal effect, that *it was not such rescission.* And it was a question of settling the equities in the present suit between the parties under the original contract which had not been rescinded by the suit against the husband, because it was legally ineffective as to the wife, and did not, "coupled *with the other facts,*" constitute a rescission. And it was held that as a matter of equity Mrs. Bentley was not entitled to recover the land as upon specific performance, but that in the adjustment of the equities under the contract, that she was entitled to recover the original purchase money and the interest on that purchase money.

The language of the court is as follows:

> "*We believe, however, where the vendee has paid a considerable portion of the purchase price which has not been repaid in the use of the property, the vendor upon a rescission should account for the amount he has received, with interest. Thomas* v. *Beaton,* 24 Tex. Sup. 318; *Coddington* v. *Wells,* 59 Tex. 29. *Plaintiff in error in her answer offered to do this. We therefore, conclude that the proper judgment as to these parties to be rendered on the findings and agreement is in favor of Mrs. Bentley for the $500.00 cash payment made by her, and in favor*

of W. J. Bentley for $813.00 interest on this amount from the date of such payment at this time." (This is on the theory of his community rights to his wife's principal in the interest earned.)

Conclusion.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this court of its supervisory powers, and that to such end a writ of certiorari should be granted and this court should review the decision of the Circuit Court of Appeals and finally reverse it.

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